INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:

Consumer Sales Corp. v. *Federal Trade Commission*, 198 F. 2d 404, certiorari denied, 344 U.S. 912	9
Corn Products Refining Co. v. *Federal Trade Commission*, 324 U.S. 726	6
Federal Trade Commission v. *Mandel Brothers, Inc.*, 359 U.S. 385	9
Federal Trade Commission v. *Morton Salt Co.*, 334 U.S. 37	6, 10
Federal Trade Commission v. *National Lead Co.* 352 U.S. 419	10
Federal Trade Commission v. *Ruberoid Co.*, 343 U.S. 470	6, 9
Federal Trade Commission v. *Standard Oil Co.*, 355 U.S. 396	7
Hershey Chocolate Corp. v. *Federal Trade Commission*, 121 F. 2d 968	9
Niresk Industries, Inc. v. *Federal Trade Commission*, 278 F. 2d 337, certiorari denied, 364 U.S. 883	9

Cases—Continued

	Page
P. Lorillard Co. v. *Federal Trade Commission*, 186 F. 2d 52	9
Regina Corporation v. *Federal Trade Commission*, 322 F. 2d 765	11
Vanity Fair Paper Mills, Inc. v. *Federal Trade Commission*, 311 F. 2d 480	9

Statute:

Clayton Act, 38 Stat. 730, as amended, by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13:	
Section 2(a)	2, 3, 5, 7, 8
Section 2(d)	7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 835

MUELLER CO., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–6a)[1] is reported at 323 F. 2d 44. The opinion of the Federal Trade Commission (Pet. 20a–28a), which is not yet officially reported, is unofficially reported at Trade Reg. Rep. (Transfer Binder 1961–1963) ¶ 15,686.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1963 (Pet. 11a–12a). The petition for a writ of certiorari was filed on February 15, 1964.

[1] The reprint of the court's opinion (Pet. 1a–6a) has included only a portion of a sentence added by the court's order of October 21, 1963, modifying its original opinion (Pet. 14a–15a). The sentence in question, the portion of which is repro-

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the findings of the Federal Trade Commission which underlie its conclusion that the effect of petitioner's price discriminations may be substantially to injure competition between its customers in violation of Section 2(a) of the Clayton Act, as amended.

2. Whether the Commission's cease and desist order, as construed by the court of appeals in the light of the Commission's findings, was unduly vague or broad.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in pertinent part as follows:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or

---

duced at pp. 4a–5a of the petition, should read as follows (Pet. 14a–15a, 323 F. 2d 44, at 46–47):

"Petitioner's position before the Commission and here was that to prove unlawful discrimination under § 2(a) the General Counsel was required to prove *unavailability* of the higher discount to the regular jobbers, and before the Examiner petitioner introduced evidence of availability in an attempt to establish a § 2(d) defense."

> resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

STATEMENT

The Federal Trade Commission's complaint charged that petitioner discriminated in price between competing purchasers of products of like grade and quality and that the effect of this discrimination may be substantially to lessen competition, in violation of Section 2(a) of the Clayton Act, as amended (J.A. 1–5).

Petitioner manufactures and sells valves, fittings, and other parts and accessories for use in gas and water distribution systems. It sells virtually all of its gas products and about one-half of its waterworks products directly to end users. The other half of its waterworks products, however, are sold through jobbers located throughout the United States. Petitioner classifies its jobbers as either "limit" (or "stocking") jobbers or "regular" jobbers, but both classes compete with one another in the resale of these products. Both are granted a 15% discount from petitioner's published price lists on all orders for direct or "drop" shipment by petitioner to ultimate users. The 15%

discount is also given on many orders for shipment to the jobber himself, regardless of his classification. But on certain types of waterworks items—the smaller, more commonly used parts which account for about 40% of the dollar volume of petitioner's waterworks sales—petitioner sells to "limit" jobbers at a 25% discount when shipped to their warehouses, while on the same items "regular" jobbers are given only a 15% discount, regardless of where shipment is made (Pet. 2a, 16a–17a, 20a).

After an administrative hearing, the Commission concluded that petitioner's grant of a 10% greater discount to "limit" jobbers was a price discrimination, the effect of which "may be substantially to injure, destroy, or prevent competition" between petitioner's "limit" and "regular" jobbers (Pet. 18a). In reaching that conclusion it took note of petitioner's claim (Pet. 18a) that the additional 10% discount merely compensated the "limit" jobber for the warehousing expenses incurred in stocking petitioner's products. The Commission found, however, (a) that while "limit" jobbers ordinarily stock products on which they receive the extra discount, there were instances in which the discount was given on products not actually stocked, and (b) that petitioner's evidence as to whether the extra 10% was offset by the extra warehouse expenses was contradictory and inconclusive (Pet. 24a–25a).

The Commission also found that the extra discount was not freely available to "regular" jobbers, that petitioner refused the discount to a "regular" jobber

if there was already a "limit" jobber which it felt was adequately servicing the area or if it wished to protect "old established jobbers * * *" (Pet. 4a, 26a–27a). The Commission further found that even if petitioner had been able to establish that the "limit" jobbers' discount advantage had been offset by warehousing costs, the "limit" jobbers would still enjoy the substantial competitive advantage of having petitioner subsidize their warehousing of those products which were the most frequently demanded, particularly to meet emergencies (Pet. 25a). On the basis of these findings, the Commission reversed the hearing examiner's dismissal of the complaint for failure of proof (Pet. 33a), concluded that the effect of the discrimination in discounts may be substantially to injure competition, and entered a cease and desist order (Pet. 19a).

The court of appeals, one judge dissenting, held that there was substantial evidence in the record to support the Commission's findings and affirmed the Commission's order as read in the light of the court's opinion (Pet. 1a–11a). In denying a petition for rehearing, the court modified its opinion slightly (Pet. 14a–15a).[2]

ARGUMENT

1. (a) Section 2(a) of the Clayton Act, as amended, prohibits price discrimination where the effect "may be substantially to lessen competition * * * or to injure * * * competition with any person who either

[2] The reprint of the court's opinion (Pet. 1a) has omitted a portion of the opinion, as modified (see note 1, *supra*, pp. 1–2).

grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *." See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37; *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726. This case does not involve the traditional "functional" discount where differing prices are charged to non-competing classes of distributors operating at different levels of distribution, e.g., wholesale and retail. Here, petitioner's price discriminations are between competing customers performing the same distributive function, i.e., reselling petitioner's products to ultimate users. To the extent that these discriminations may result in the anticompetitive effects proscribed by the statute—and the Commission held that they have such effects—they are unlawful. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 475.

In holding that petitioner had not refuted the showing of competitive injury, the Commission found: (a) that the evidence presented by petitioner to show that the extra 10 percent discount to "limit" jobbers was offset by their cost of warehousing the items was inconclusive and contradictory; (b) that in some instances the discount was paid even though the merchandise was not warehoused or stocked; (c) that not all competing jobbers were given the opportunity to obtain the extra discount; and (d) that even if the extra discount were fully offset by warehousing costs, the "limit" jobbers would still derive a substantial competitive advantage from the ability to keep the commonly called-for items in stock at petitioner's expense. The court of appeals was satisfied that these findings were supported by

substantial evidence (Pet. 1a–6a). The sufficiency of the evidence is a question "which Congress has placed in the keeping of the Courts of Appeals." *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401.

(b) The reasons advanced by petitioner for granting the writ go to issues which are not presented by this litigation. Contrary to petitioner's suggestion (Pet. 2), the Commission has not held that Section 2(a) bars different compensatory discounts to competing distributors who perform different functional services of unequal cost or value. As the court of appeals noted, the Commission, in referring in its brief to this practice, conceded that "this is a perfectly proper procedure, provided it be done in a fair and legal manner" (Pet. 6a).

Nor did the Commission hold, contrary to petitioner's assertion, that noncompliance with the requirements of Section 2(d)[3] constituted a violation of Section 2(a).[4] To be sure, the Commission found,

[3] Section 2(d) provides as follows:

"[I]t shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or comomdities."

[4] The confusion on the issue of the relationship between Sections 2(a) and 2(d) apparently resulted in the following way: In support of the hearing examiner's finding that the extra discount status was freely available to "regular" jobbers,

as one of the grounds for its decision, that petitioner unjustifiably made the higher discount available to some, but not others, of its jobbers. While this finding may, without more, have spelled out a violation of Section 2(d), it was also relevant to the Section 2(a) issue—whether there was a discrimination in price between the competing jobbers which may substantially lessen or injure competition.

In any event, the Commission's determination of the adverse effect on competition was sustainable quite apart from that finding, for it was found that petitioner granted the extra discount in instances where the preferred jobber did not actually stock the merchandise and that petitioner's evidence to show that the advantage of the extra discount was cancelled out by warehouse expenses was inconclusive.

2. Petitioner complains that the Commission's cease and desist order is too broad because it applies to gas products as well as waterworks products, whereas the Commission's findings of illegality pertained solely to the latter.[5] The court of appeals properly re-

---

petitioner argued in substance before the Commission that its practices comply with the requirements of Section 2(d) and were therefore not impeachable under Section 2(a) (Pet. 4a, 27a). The Commission's response to petitioner's argument was that petitioner's practice would not have been in compliance with Section 2(d) "if this section were applicable" (Pet. 27a). Thus, the Commission did not reach the question of whether compliance with Section 2(d) would be a defense to a charge of violation of Section 2(a).

[5] The Commission's order (Pet. 19a) directed petitioner, in the sale of its gas and waterworks products, to cease and desist from:

"Discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling to any purchaser

jected this complaint, holding that it is within the scope of an agency's discretion to frame its order broadly enough to prohibit the illegal practice in connection with any products sold by the offender (Pet. 6a). This holding is in accordance with a long line of decisions on the point, (see, e.g., *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480, 487–488 (C.A. 2); *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337, 343 (C.A. 7), certiorari denied, 364 U.S. 883; *Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F. 2d 404, 408 (C.A. 2), certiorari denied, 344 U.S. 912; *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 59 (C.A. 4); *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968, 971–972 (C.A. 3), and is but an application of the settled principle that the Commission may "close all roads to the prohibited goal * * *." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392–393.[6]

---

at net prices higher than the net prices charged any other purchaser competing in fact with such unfavored purchaser in the resale and distribution of such products."

[6] In any event, the Commission's inclusion in its order of gas products poses no immediate threat to petitioner's distribution of these products. The order covers only those sales which involve price discrimination between petitioner's customers who compete with each other in the resale of the pertinent products. Since, as petitioner states (Pet. 17), "[f]or the most part [gas products] are not sold through jobbers" but are sold directly to end users (Pet. 2a), petitioner need have little to fear, so long as it adheres to its present method of gas products distribution. Should it change over to a system of jobber distribution, as it has done with respect to waterworks products, the Commission's order would apply and properly so for the reasons given above in the text.

Petitioner also contends that the order is too "vague" (Pet. 17) and will require it to give up the use of independent distributors and resume its own field warehousing operations (Pet. 19). That contention, however, rests on the incorrect assumption that the order prohibits different prices to competing distributors who perform different functional services at unequal cost. But as the court of appeals said (Pet. 6a):

> * * * The Commission's order is based on findings: that the amount of discount was not cost justified; that stocking jobbers have received stocking discounts where no warehousing function was provided; and that stocking jobber status was not available to all on objective standards. The Commission's order, although written in broad terms, is based on and is limited by those findings of fact. * * * The Commission, in its brief, referring to the practice of compensating jobbers who perform a warehousing function, states: "* * * this is a perfectly proper procedure, provided it be done in a fair and legal manner." We approve the order on that basis.

In approving the order "on that basis", the court below, as this Court has done on occasion, read "the order in its relation to the circumstances of th[e] case * * *." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 52; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 423–425. As thus read, the order will plainly not disrupt petitioner's distribution system but will merely require petitioner to conduct it in a manner consistent with the require-

ments of the statute. Moreover, "[i]n coping with the Order, petitioner, in addition to exercising its own sound business judgment, may seek advice and aid from the Commission [citations omitted]" *Regina Corporation* v. *Federal Trade Commission*, 322 F. 2d 765, 770 (C.A. 3).

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions or other compelling reason for review by this Court. The petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
Attorneys.

JAMES MCI. HENDERSON,
General Counsel,
J. B. TRULY,
Assistant General Counsel,
ALVIN L. BERMAN,
THOMAS F. HOWDER,
Attorneys,
Federal Trade Commission.

APRIL 1964.

U. S. GOVERNMENT PRINTING OFFICE: 1964